BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Alameda County Residents Concerned About Smart Meters for Modification of D.06-07-027	**Application 11-07-009 (Filed July 18, 2011)**

COMMENTS BY Alameda County Residents Concerned About Smart Meters (ACRCASM) ON ALJ PETER ALLEN'S PROPOSED DECISION OF SEPTEMBER 23, 2016, ON ACRCASM'S APPLICATION A11-07-009

This commentary submitted by

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Dated October 10, 2016

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1. Introduction

Pursuant to Rule 14.3 and Rule 1.13 of the Rules of Practice and Procedure of the California Public Utilities Commission ("PUC" or "Commission"), Alameda County Residents Concerned About Smart Meters (ACRCASM, herein referred to as "ACR") hereby comments on the "Proposed Decision" of September 23, 2016, served by ALJ Peter Allen, which proposes that the Public Utility Commission deny ACR's Application A1107009, filed on July 18, 2011, and requests that ALJ Allen's proposed decision be instead denied and dismissed.

2. Summary and list of changes to ALJ Allen's Proposed Decision

ACR requests and proposes that ALJ Allen's Proposed Decision (herein referred to as "Allen's PD) should be denied and dismissed as without merit for the following reasons:

(1) according to Rule 6.4, Allen's PD is improper and in violation of PUC Rules because issued long after the deadline for such a proposal has passed, and thus is both untimely and moot;

(2) it fails to respond to the real arguments made by ACR on the basis of the *Koponen* decision, grossly misreading those arguments; Allen's PD addresses the Court's conclusions in *Koponen*, whereas ACR addresses the legal principle that forms the foundation of the Court's decision in *Koponen,* as given in the California Public Utility Code.

(3) in the sense, and following upon the error in Allen's PD regarding the argument made by ACR with respect to *Koponen*, it is thus in error in continuing to categorize this Proceeding as "ratesetting" (section 5, page 9, of ALJ Allen);

(4) Allen's PD is ethically, technically, and legally derogatory toward the purposes of the PUC, which are to protect the safety and security of the public from malfeasance by public utilities regulated by the PUC, sadly ignoring the responsibility that the PUC has to the residents of California, a responsibility pointed out by many others over the past 6 years.

ACR thus asserts and affirms that, despite ALJ Allen's arguments, ACR's application stands and is in effect, affirmed by default owing to the PUC's failure to address it in a timely fashion.

3. Background

In 2006, PG&E applied for authorization to begin installation of Smartmeters (also referred to as Advanced Metering Infrastructure, or AMI) in the domain it serviced as a public utility in California. That permission was granted in Decision D.06-07-027, and later modified in 2009 in Decision D.09-03-026. In 2011, PG&E applied to reopen those two decisions granting authority to install Smartmeters, in order to define an “opt-out” program (A1103014). ACR was party to a number of protests against PG&E’s application. Because PG&E had reopened the original decisions (D.06-07-027 and D.09-03-026 hereafter referred to as “original authorization”), modification of those decisions then became possible. It was because the “original authorization” had been reopened, it behooved the public, including ACR, to request that both PG&E and the PUC faced a new requirements, according to its own rules and prior decisions, owing to new experiences gained from prior Smartmeter installation over the preceding two years. Because PG&E had reopened those decisions, ACR and others argued that fact finding hearings were called for, and indeed necessary. Those hearings would have been to determine whether the people of California required any specific protections against this new technology, as well as from malfeasances incurred in the process of installation. Though during the summer and fall of 2011, certain hearings were held, they did not address the issues that the parties protesting had raised, namely, threats to resident health, threats to domecile security ("hackability"), threats to privacy, and malfeasance in installation.

4. Discussion

4.1 Allen’s PD is not timely and is thus moot

The date of ACR response to PG&E’s protest of ACR application A1107009 is September 2, 2011. The date of Allen’s PD’s proposal to deny A1107009 is September 23, 2016. That proposal to deny is more than 5 years after the last proceedings on ACR’s application. That is more than three and a half years after the deadline given for such a proposal in the Rules of Practice and Procedure. Rule 6.4 (d) states:

> (d) Any person protesting or responding to an application shall state in the protest or response any comments or objections regarding the applicant's statement on the proposed category, need for hearing, issues to be considered, and proposed schedule. Any alternative proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

In its application, ACR called for hearings under the authority of SB960 and Public Utility Code 1702.1(e), which established that any decision made by the PUC is required to include fact finding that might be necessary or relevant in making that decision. ACR's application not only called for hearings, but also included a schedule, with a deadline of its own. Allen's PD fails to provide any stated objections to the need for hearings raised by ACR.

Rule 6.4(d) states that "any alternate … schedule shall be consistent with the proposed category, including a deadline." The deadline cointained I ACR's application was well within the maximum time frame provide by the Rule, namely 18 months – a deadline also affirmed in Rule 2.1(c). Because that deadline was not met, Allen's proposal becomes moot. In essence, it dismisses itself.

This means that the proposals made in ACR's application remain uncontested, and are thus in effect. In particular, these proposals argue, first, that the PUC must call fact finding hearings on Smartmeters with respect to human health conditions attendant upon installation, certain security vulnerabilities that Smartmeters engender, and certain surveillence vulnerabilities to which they subject the people of California, all owing to the use of the communications technology added to the utility's metering purposes. These hearings are also warranted by the fact that PG&E reopened the original authorization for the purposes of modification.

The legal foundation for these charges are detailed in A1107009 and in ACR's protest to A1103014.

4.2. The issue of the *Koponen* Decision

Allen's PD states that ACR's argument depends "almost exclusively" on *Koponen v. PG&E*, 165 Cal. App. 4th 345 (2008). This is not so, but ACR does use that decision as a basis for some of its arguments. Where Allen's PD fails, however, is in misreading ACR use of the *Koponen* decision. As a result, Allen's PD is in error with respect to that matter.

Allen's PD states that "ACRCASM also relies on *Koponen* to argue that the installation of AMI by PG&E falls outside the permissible use of the easement that PG&E has over its customers' property." (p.5) ACR's argument concerns the ability of the PUC to mandate the installation of Smartmeters, not simply permit it. The *Koponen* Decision addresses the fact that PUC jurisdiction is limited to its own relation to public utilities, and that it has no jurisdiction with respect to the relation between public utilities and their customers except in the matter of ratesetting. In the domain of the relation between public utilities and their customers, PUC Rules

no longer apply. Thus, ACR properly confronted and contested the PUC's decisions in that domain.

And if the PUC nevertheless seeks to venture into a domain where it has no jurisdiction, it must do so through recommendations to the state legislature, and lay the basis for such recommendations through dialogue with the public, holding fact finding hearings concerning those dangers and threats. Both Allen's PD and the PUC generally have ignored this distinction in jurisdiction.

In arguing against ACR, Allen's PD speaks about the conclusions drawn by the Court in *Koponen* (4). What ACR drew from that decision, however, was its underlying principle, that upon which the Court concluded. The court found that PUC regulations do not supersede court decision. The important element is the principle upon which it is founded. That principle is that there is a difference between the relationship between the PUC and the public utilities on the one hand, and the relationship between the public utilities and the public on the other. If the latter is one of commercial exchange, the former is one of regulation by the PUC. The former is properly the domain of PUC regulation, and the latter is properly the domain of legislation. The Public Utility Code authorizes PUC to regulate public utilities, but it bars the PUC from interfering in the relation between the utilities and the public, with the exception of ratessetting. Thus, the court found that the PUC has no regulatory power over private property rights, nor over the specific contracts that persons or governments might establish with a utility (franchise agreements). That prohibition extended to barring the PUC from modifying the right of way enjoyed by a utility.

ACR argued that PGE violated its easement by introducing new machinery or technology on a customer's private property. Its original right of way (easement), granted by state legislation, only gave the utility the power to maintain its equipment. PGE states as much on its webpage. PG&E's Electric Tariff Rule 16.A.11 enumerates PG&E's rights under its easement. It includes "meter reading, inspection, testing, routine repairs, replacement, maintenance, emergency work, etc." It does not include installing additional communications technology. Nor does it give PG&E the power to upgrade.

ALJ Allen himself paraphrases this distinction in domains. "*Koponen* held that some controversies are properly brought before the courts, while others that would hinder or interfere with the Commission's exercise of its regulatory authority are barred." (5) Some complaints can be brought to the PUC while other issues are properly brought to the courts, having to do with statutory law.

Nevertheless, Allen's PD doesn't mention that principle, and effectively denies it in its argument against ACR. For instance, it falsely conflates them in making the following argument.

> ACRCASM is not trying to bring an action in superior court, but is expressly asking the Commission to take action. ACRCASM specifically asks that the Commission hold fact finding and evidentiary hearings (ACRCASM Application at 21-22), and that the Commission take specific actions, including ordering a moratorium on AMI installations. (*Id.* at 22-23.) ACRCASM cannot simultaneously argue that the Commission has no authority to address AMI while asking the Commission to address AMI. (5)

The first two sentences are true. But the action that ACR is asking the Commission to take is to stop authorizing installation of Smartmeters without specific permission by property owners. The name for such an action, calling for the cessation of an action, is "moratorium." And the reason for asking for a moratorium is that the PUC did not have the power or authority to permit such installation in the first place without express permission from property owners. It is on this basis that ACR argues that the Commission has no authority, while asking the Commission to act on AMI installation by cancelling its given permission.

In failing to be consistent concerning the distinction between those two domains, ALJ Allen's statements about ACR's argument from *Koponen* are false.

4.3. Ramifications of "the *Koponen* Principle"

The ramification of this separation of domains of authority between the legislative and the regulatory is that the PUC cannot make installation of Smartmeters mandatory. Or to phrase this more properly, because, in the "original authorization" of the Smartmeter program, installation of a Smartmeter was to be voluntary, the PUC's decision to authorize installation without express permission is "counter-voluntary." This PUC decision also runs counter to federal guidelines in legislation of 1996 and 2005 authorizing the use of Smartmeter technology nationally, which also made acceptance of Smartmeter technology voluntary for all utility customers. What was made "mandatory" in the federal legislation was that all public utilities had to offer it to their customers. But no law stated that a customer had to accept it. The necessity to obtain permission from the customer meant that the customer could either "opt in" or not.

PG&E has not stated that it requires its installation program to be "mandatory," or "counter-voluntary." Instead, it asks for compensation for those cases in which installation is refused (A1103014). That is, it wishes to charge a fee for refusal, which amounts to considering

it "mandatory." When the PUC authorizes it to do so, it is likewise rendering installation "mandatory," or counter-voluntary, as policy. This signifies that the PUC has adopted a policy concerning the relation between the utility and its customers, something for which it has no authority. Though it may label its action “ratesetting,” its affirmation of a counter-voluntary is a proceeding that is beyond its regulatory power. For the PUC to continue to categorize A1103014 as "ratesetting" is to be factually in error.

For this reason, extension of PG&E’s property easement to include installation of Smartmeters without express permission of the property owner is legally in error. Insofar as Allen’s PD also categorizes this proceeding as "ratesetting" (p.9), it is both factually and legally in error.

4.3A. The Issue of Mandate in Sect. 745

There is one area in which the legislature grants the PUC the power to mandate, the implementation of time-of-use (TOU) pricing or rates. Sect. 745 (a) (2) of the Public Utilities Code enumerates the types of pricing in question, and section (b) gives a schedule of dates after which the PUC can require TOU pricing – namely, January 1, 2013, January 1, 2014, January 1, 2020. After those dates, the Commission can “require or permit an electrical corporation” to employ “mandatory or default time-variant pricing” for residential customers (with varying degrees of “bill protection”). Section (d) states that “On and after January 1, 2014, the commission shall only approve an electrical corporation's use of default time-variant pricing … if … Residential customers have the option to not receive service.”

Two minor observations will suffice with respect to this ordinance. The first is that it cannot be used to mandate the installation of Smartmeters, since they are not essential to TOU pricing or billing. The utilities have had the ability to offer TOU pricing for well over 15 years. I personally have seen electric utility bills from 15 years ago that had TOU pricing. And second, this section of the PU Code only refers to rates, to real time pricing, and not the installation of technology beyond that necessary for metering.

4.3B. The issue of Technology

With respect this technology, Allen’s PD makes a false statement. It remarks, in passing, that “metering, whether digital or analog, whether read remotely or by a human meter reader, is an integral part of providing electric service.” This is in error. The ability to read the meter remotely requires technology that is not part of metering electricity use. If analog meters and smartmeters are equivalent in the latter term, they are not in the former. Allen’s PD falsely

conflates these two disparate aspects. The metering function of the two types of meters may be parallel (though there is controversyial since the Smartmeter's communications capability is bidirectional, giving the utility the power to modify the Smartmeter's functions remotely), but the communications capability goes beyond that.

As mentioned above, according to PG&E's Electric Tariff Rule 16.A.11, PG&E's easement includes "meter reading, inspection, testing, routine repairs, replacement, maintenance, emergency work, etc," but does not include communications technology. Communications technology is not essential to "furnishing electric service," since electric service can proceed quite well without it. It is the difference between communications technology and what is needed to "furnish electric service" that is highlighted by the fact that the former makes some people ill, and disrupts their lives, whereas its absence does not. That is proof that something has been added that is beyond PG&E's easement.

To say that the PUC has overstepped the bounds of its legal authority does not imply that the PUC has no role to play in guarding the safety and security of PG&E's customers. Indeed, that is precisely the legislated purpose of the PUC. If PG&E has to come to the PUC for permission to install a certain new technology, it is totally within the purview of the PUC, as well as its responsibility, to ask, is this new technology proper, safe, and beneficial to the people, or are their problems with it? Should it fail to do so, it would be remiss and in abrogation of its lawful purpose. In line with our proposals in A1107009, ACR again calls for fact finding hearings on the potential adverse effects of Smartmeters installation, including vulnerability to hacking, an attendant property insecurity, its availability to surveillence mechanisms, and its reduction of property values.

4.3C. The issue of health concerns

When the issue of health concerns is raised, as it has been continuously since Smartmeter installation began, state and local governments have responded that they are prohibited from addressing the issue by the Telecommunications Act (TCA) of 1996, which bars the use of "environmental effects" to limit the permitting of telecommunications technology. Sect. 704 of that act states:

> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

This prohibition is clear. It refers to RF emitting technology on the environment of that emitter. Should a Smartmeter cause nearby bushes to wither and die, that is just too bad.

To interpret this as barring health conditions from consideration, however, is in error. Human health conditions are not part of the environment of an RF emitter. It is the emitter that becomes an adverse part of the "environment" of the human being when that person suffers from RF influences. It is not a “health effect,” since the term “effect” assumes a unidirectional causal relationship. Health conditions rely upon an interactive relationship between human’s physiology and their environment. We emphasize that it is a question of “their environment,” not the "environment" of the RF emitter. TCA Sect. 704 focuses on the environment of the RF emitter. It is speaking about a different relation than that of human health, for which humans are the focus, and the emitter the environment.

When an emitter is installed, it becomes part of a “new environment” for the people in its vicinity after it is turned on. If the RF emitter can be identified as a harmful environment factor for those people, then it becomes in issue for government insofar as it has a responsibility to protect its constituents from harm.

In this sense, insofar as health concerns are not in the purview of the TCA, their protection is empowered by the US Constitution, in the 10th Amendment. The 10th Amendment states that powers not expressly given to the federal government are reserved for the states and the people. There are no powers over human health conditions given to the federal government, neither in terms of interstate commerce, nor citizenship, nor armed services (which develop their own standards of acceptance of persons into the services). Therefore, health conditions remain entirely under the purview of local and state legislation.

For utility corporations to claim that the TCA bars local government from protecting their constituent’s health conditions is not only a misreading of the TCA, but an erroneous interpretation of the 10th Amendment. Yet it has been able to bamboozle local government into abrogating its responsibility to the health of its constituencies.

There is now a worldwide movement to study the effects of microwave radiation on human beings. And there are many effects that can be studied, such as depressing or exciting certain physiological conditions, breaking or distorting protein molecules, and disrupting the activity of DNA. Other governments have acted in a precautionary manner with respect to this issue. France, for instance, has mandated that no RF emitters, such as wifi routers or cell phones, may be located in kindergartens or grade schools. Scientists all over Europe have formed conjunctions and organizations to pressure the EU to take similar stands and study the

dangers from such radiation carefully. The Parliamentary Assembly of the Council of Europe (PACE) calls on governments to “take all reasonable measures” to reduce exposure to electromagnetic fields. (Cf. http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9EBECF9B-1D9F-4F6C-96C6-3D55D5872F46})

[See also: www.globalresearch.ca/smart-meter-dangers-the-health-hazards-of-wireless-electromagnetic-radiation-exposure/31891; and http://articles.mercola.com/sites/articles/arcives/2011/06/02/European-leaders-call-for-ban-of-cell-phones-and wifi-in-schools.aspx]

4.4. The issue of hearings in general

Ultimately, the total failure to consider fact finding hearings by Allen’s PD is the most glaring omission from the proposal, from a legal as well as a technical standpoint.

There are four aspects of law to which ACR made reference with respect to the issue of hearings, both in A1107009 and in its protest to A1103014. First was the fact that a closed process was reopened. Insofar as that reopening occurred after a period of time, new fact finding hearings were needed to keep abreast of the changing electromagnetic situation and environment, as well as scientific knowledge about it.

. Public Utility code, sect. 1701.2 (e) states: “The commission’s decision shall be supported by findings of fact on all issues material to the decision, and the findings of fact shall be based on the record developed by the assigned commissioner or the administrative law judge.”

Second, the PUC had itself stated that hearings were an essential part of the decision process. In a different proceeding (D.07-12-005 (2007)), the PUC recognized and stated that fact finding is an essential aspect of any PUC procedure. Both the reopening of the prior decision to permit Smartmeter installation (decisions of 2006 and 2009), and the acceptance of the principle that residents had to “opt out” rather than “opt in” required fact finding hearings.

Third, the PUC made a decision with the reopening of the “original authorization”, namely to consider the installation of Smartmeters to be counter-voluntary. In that sense, as stated previously, it overstepped the bounds of its own authority, assuming the power to govern relations between itself and the public that it does not have. Had it called for fact finding hearings upon reopening the original authorization, that malfeasance would not have occurred.

Fourth, the PUC has itself been modified by state statute, namely SB960 and SB 608, to insure that if ratepayers need fact finding hearings, owing to any kind of problem or protest against a decision by the PUC, that the Office of Ratepayers Advocates was empowered to assist in the establishment of such fact finding hearings.

Fact finding hearings are different from public hearings. In public hearings, the public comes and expresses its opinions. In fact finding hearings, expert testimony is elicited as to the character and effect of a government program or the introduction of new technology. If legislation is necessary to rectify a malfeasance at the hands of public utilities, or to determine that none has occurred, fact finding hearings become essential to guiding the legislature in meeting that challenge. To refuse to hold fact finding hearings is to preempt and short-circuit that responsibility on the part of the legislature. That is a power the PUC does not legally enjoy.

In proposing to deny A1107009, Allen's PD suggests that the PUC as a whole continue its refusal to take responsibility for the technical necessities attendant upon its reopening of the Smartmeter original authorization, and thus to continue to be in violation of its state mandate (Public Utility Code) and its responsibility to the people of California.

Authorities cited:

ALJ Allen's "proposed decision" of Sept. 23, 2016, on A.11-07-009. Application A.11-07-009, an application for the modification of the original authorization of the Smartmeter program, filed July 18, 2011, by Alameda County Residents Concerned About Smartmeters (ACRCASM). A.11-03-014 and the protests and motion filed therewith, in particular, ACRCASM's motion of Sept. 20, 2011. PUC decision D.07-12-005, 2007. PUC Rules and Regulations. Rule 2.1(c), Rule 6.4 (d). Public Utility Code, Section 745. Public Utility code, sect. 1701.2 (e). PG&E's Electric Tariff Rule 16.A.11. *Koponen v. PG&E*, 165 Cal. App. 4th 345 (2008). Telecommunications Act of 1996, Sect. 704. US Constitution, Amendment 10. *FCC Consumer Guide, Wireless Devices and Health Concerns*.
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Findings of Fact

1- The only arguments brought against A1107009 have been those of PG&E's Protest filed August 25, 2011, and the Proposed Decision of ALJ Allen, filed September 23, 2016.

2- The ACR's reply to PG&E's Protest has gone unanswered.

3- The Proposed Decision of ALJ Allen is moot, given that it was not filed in a timely manner, given the existence of deadlines for such filings in the PUC Rules and Regulations.

4- The arguments advanced by ALJ Allen are either in error according to law, or in error owing to a misreading of the arguments in A1107009, to which ALJ Allen sought to respond.

5- Insofar as no valid arguments of a timely and logical nature have been brought against A1107009, the that application, filed by ACR on July 18, 2011, remains open, and has the weight and force of a PUC decision.

6- This fact has certain implications.

First, the intent of the "original authorization" of the Smartmeter program, that acceptance of this new technology be voluntary, has therefore been restored, and the erroneous decision by the PUC, that Smartmeters can be imposed by counter-voluntary installation, is negated and voided.

Second, A1103014 must be set aside, and considered invalid as long as fact finding hearings are not held on issues of health with respect to Smartmeters, and on issues of residence vulnerability attendant upon Smartmeter installation. That means that all the moneys paid to PG&E for opt out fees are illeigimate, and must be returned.

Third, the utility property easement enjoyed by PG&E can no longer be considered to allow Smartmeter installation without express permission from the property owner.

Conclusions of Law

1- All fees collected through the PGE opt out program must be refunded to their respective ratepayers.

2- PGE must request written permission (although after the fact) from every property owner and every customer on whose residence a Smartmeter has been installed.

3- Should a property owner or resident not wish to have the installed Smartmeter remain installed, PGE will have to replace it with an analog meter.

4- Fact Finding hearings must be held on issues of the relationship between Smartmeters and human health, the security of domecile, and surveillence. These hearings must be carefully organized, so that the growing scientific expertise and knowledge that has accrued over the last five years with respect to these matters can be heard, and in order for government to make policy with respect to these issues.

5- It behooves the PUC to ratify the encumbent conditions defined in A1107009 by transforming it into D1107009.

* * *

Dated October 10, 2016, at Berkeley, California.

/s/ Steve Martinot

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VERIFICATION

I, Steve Martinot, represent Alameda County Residents Concerned About Smartmeters, and am authorized as its Recording Secretary to make this verification on the organization's behalf. I declare under penalty of perjury that the statements in the foregoing document are true and correct to the best of my knowledge and belief.

Dated October 10, 2016, at Berkeley, California.

/s/ Steve Martinot
Steve Martinot